



COVID-19: RESPONSIBILITIES AND REPARATIONS UNDER INTERNATIONAL LAW.

DEPARTMENT OF LAW, UNIVERSITY OF IBADAN, NIGERIA

BY JOY. B. EGUAOJE

joyceeguaoje@gmail.com

Abstract

The advent of the year 2020 marked the confirmation of a novel respiratory virus identified as the Coronavirus. The Coronavirus is believed to have originated from Wuhan, China. It has resulted in over 600 thousand deaths and has placed the world economy in shambles. It is argued that the failure of China to effectively handle the virus in its early stage resulted in the eruption that the world currently suffers. This paper seeks to critically analyse the culpability of China for the spread of Covid-19 by applying the provisions of related international instruments and making recommendations for the reparations that are necessary on the part of China - if it is indeed culpable.

Keywords: Culpability, State responsibility, International law, COVID-19, Severe Acute Respiratory Syndrome (SARS).

1.0. Introduction

The morning of the 11th of March, 2020 came with the news that the World Health Organization (WHO) had deemed it fit to officially place the infamous Covid-19 to the position of a worldwide pandemic. Before this, only a few countries of the world battled with the new strain of the Severe Acute Respiratory Syndrome (SARS) called the Coronavirus. The Coronavirus is said to have originated from a wet market in Wuhan, Hubei Province in China.¹ It has since spread to almost all the countries of the world and has resulted in an unprecedented disruption in the economic, political, and social lives of billions across the globe.² It has also occasioned more than 14 Million infections and more than 600 thousand deaths.³

Quite a number of States are convinced that China's actions or inactions gave way to the spread of the virus.⁴ Consequently, the calls for reparations from China have been hinged on the beliefs that the principles of international State responsibility were disregarded by China in the management of the virus.⁵

2.0. States Responsibility under International Law

It is evident that the Coronavirus is not constrained to the boundaries of a single country, as such; the determination of a State's culpability can only be viewed in terms of International obligations. There is a need to take an in-depth look at the responsibility of States at the international level to fully assess China's culpability in the spread of the Coronavirus.

Article 2 of the Articles on the Responsibility of States for Intentionally Wrongful Acts stipulates that there is an internationally wrongful act of a State when conducts - consisting of an actions or omissions – are attributable to the State under any International law, or when it constitutes a breach of international obligations of the State.⁶ This connotes that to assess China's responsibility and culpability via international law will be to prove that there are international instruments for infectious diseases that can be breached, and China's actions or inactions can be attributed to the breach of such instruments.

3.0 Assessing China's Culpability in the Spread of Covid-19.

Some international instruments grant for State obligations concerning infectious diseases. The culpability of any State is hinged on whether its actions have resulted in the breach of such international instruments. China's scale of culpability in the spread of Covid-19 can only be tipped if the conduct of China has breached the international instruments that are considered to be binding.

3.1 Issues in Contention.

There have been several assertions that China failed to take crucial steps at the early stage of the virus to curb its spread, and for that, it should be held culpable for the spread of Covid-19. However, the stance of China concerning its actions relating to Covid-19 takes an opposite route from the assertion above, hence the existent contention.⁷

¹Sarah Newey and Anne Gullard, What is Coronavirus, How Did It Start, and How Big Could It Get? *The Telegraph* (United Kingdom, 23 August 2020)

²Fidler David, Covid-19 and International Law: Must China Compensate Countries for the Damage? (*Just Security*, March 2020) <<https://www.justsecurity.org/69394/covid-19-and-international-law-health-regulations/>> accessed 21 July, 2020

³See 1 above

⁴Rauhala Emily, World Health Organization: China Not Sharing Data on Coronavirus Infections among Health Care Workers *The Washington Post*. (Washington, Feb 26, 2020)

⁵Creutz Katja, China's Responsibility for the Covid-19 Pandemic: An International Law Perspective (*Finnish Institute of International Affairs*, 2020)

⁶There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.

⁷ <https://www.pewresearch.org/global/2020/07/30/americans-fault-china-for-its-role-in-the-spread-of-covid-19/> accessed on the 12th of October 2020

If it is agreed that culpability involves the degree of one's responsibility in wrongdoing,⁸ then the culpability of an entity can only be weighed when it is evident that there has not only been a breach of rules, but the breach of such rules can be traced to the entity in question. Bringing it down to the issue at hand, it is important to critically assess the rules that guide State responsibility at the International level and to trace such breach of the rules to the actions of the People's Republic of China (if such actions are existent).⁹

3.2 Rules of International Instruments.

The rules of State responsibility ascertain that for the responsibility of a state to come into question, the State actions must amount to a breach of binding international obligations.¹⁰ The Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) stipulates some general conditions under the international law for which a State can be considered to be responsible for a wrong.¹¹ It must be noted that the ARSIWA does not expressly provide rules for State parties, it merely grants for situations where the State can be culpable for wrongdoing(s).¹² The instrument states that a breach of an international obligation occurs when an act of the State is not in conformity with what is required of it by that obligation.¹³ It further grants that the conduct of a State organ shall be considered to be an act of the State under international law irrespective of the position of that organ within the State.¹⁴

The State is also guilty in cases where the breach extends over the entire period starting with the first actions or omissions.¹⁵ This means the State is under an obligation to cease the act (if it is continuing), or to offer appropriate assurance of non-repetition of such conduct.¹⁶ Interestingly, the State that is responsible is under obligation to make full reparation for the injury caused by the internationally wrongful act.¹⁷ Chapter II of the ARSIWA grants that restitution can be made to the extent that such is *not materially possible*.¹⁸ On the occasion that restitution is not possible, the State is required to compensate the other injured States for the damages caused.¹⁹ However, when Restitution or Compensation does not fully address the wrongful act then Satisfaction can be utilized.²⁰

Notably, unlike the ARSIWA, the International Health Regulations (IHR) contains express regulations that a State party is obligated to obey. The IHR goes on to provide that State parties must ensure that it notifies the World Health Organization (WHO) of all events that may constitute a public health emergency of international concern in its territory within 24 hours after assessment.²¹ Such information must be effective, timely, and sufficient in the case of a public health emergency.²²

On the off-chance that the state party has evidence of an unexpected or unusual public health event within its territory which may constitute a public health emergency of international concerns, such State must provide to the WHO all relevant public health information with the most efficient means of communication available.²³ In cases of public health emergencies, the State is also obligated to implement preliminary control measures required to prevent domestic and international spread immediately after the report to the WHO.²⁴

In addition, the regulations that constitute the framework of the Prevention of Transboundary Harm from Hazardous Activities (PTHHA) grants that in cases where there has been a within-border transmission of infectious diseases, the State from which such

⁸ "Culpability," Merriam-Webster.com Dictionary <<https://www.merriam-webster.com/dictionary/culpability>> accessed 1 October, 2020.

⁹ <https://foreignpolicy.com/2020/02/15/coronavirus-xi-jinping-chinas-incompetence-endangered-the-world/> accessed on the 12th of October 2020

¹⁰ See 5 above

¹¹ https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf accessed on the 13th of October 2020

¹² General Commentary, Responsibility of States for Internationally Wrongful Acts (2001). Supplement No.10 (A/56/10), Chp. IVE.1.

¹³ Article 5, Responsibility of States for Internationally Wrongful Acts (ARSIWA)

¹⁴ *ibid*

¹⁵ Article 15(2), ARSIWA

¹⁶ Article 30, ARSIWA

¹⁷ Article 31, ARSIWA

¹⁸ Article 35, ARSIWA

¹⁹ Article 36, ARSIWA

²⁰ Article 37, ARSIWA. see 5 above

²¹ Article 6, International Health Regulations (3rd ed, 2005)

²² See 14 above

²³ Article 7, International Health Regulations(2005)

²⁴ Annex 1; Core Capacity Requirement for Surveillance and Response, International Health Regulations (3rd ed, 2005).

disease originated is expected to take appropriate measures to prevent significant transboundary harm.²⁵ The State is also obligated to provide timely notifications of the risks and assessment of any transboundary harm to other states likely to be affected.²⁶ The State of Origin²⁷ is also required to provide the public with relevant information relating to the said activity, the risks involved, and the harm which might result from such activities.²⁸

Having stated the related international regulations guiding State obligations, it is essential to apply them to the actions of China's to determine if indeed there is any form of culpability.

3.3 Actions and Attribution

There have been varying reports issued by the Chinese government on one hand, and its citizens on the other. It is generally believed that the first onset of the symptoms of Covid-19 was observed on December 1st, 2019. However, other reports have influenced the belief that the first noted case was on November 17th, 2019.²⁹ The WHO China Country Office was only informed about the virus on December 31st, 2019, and this was after medical reports had given grounds to reasonably suspect the onset of a novel virus. The Human-to-Human transmission feature of the virus was not acknowledged until the 20th of January, 2020, showing that the virus had more than a month's gap to swiftly move from one host to another. By implication, the actions or omissions of China contravened Article 6(1) of the IHR which grants that the state takes all measures that are necessary the State disclose information on any public health risk within 24 hours of notice.

Likewise, complaints were made by the WHO that China was not forthcoming in its level of transparency. It failed to share crucial information such as the fact that about 1,700 of its health care workers were infected.³⁰ Once again such actions breached Article 7, IHR which obligates China to provide all relevant information about public health to the WHO.³¹ Medical personnel, such as Li Wenling, who tried to warn the public about the virus were either suppressed or tagged as "rumor-mongers." Li Wenling was forced by the Public Security Bureau to sign a letter stating that the comments he made about the existence of Covid-19 were false. Media reports were also distributed to warn netizens not to fabricate, spread, or believe rumors of the virus.³² This goes to show that China did breach Article 13, PTHHA in its failure to adequately notify and inform the public about a public health risk such as Covid-19.

It is also noted that although the Wuhan Municipal Market where the virus originated was closed down, there was no indication that steps were taken to stop wildlife trade or embark on a form of contact tracing of prospective infected persons.³³ Persons infected had the liberty to embark on trans-boundary travel because lock-down measures were not instated until January 22th, 2020.³⁴ No preliminary control was implemented to prevent national and international spread immediately after reports were made to the WHO. Connotatively, China failed to take appropriate measures to prevent significant national and transboundary spread to other countries; it also failed to provide other States with timely notification of the risks of the virus. These actions and omissions breached Annex 1 and Article 3 of the IHR and PTHHA respectively.³⁵

²⁵Article 8, PTHHA. See also Principle 21 of the Stockholm Declaration Report of the United Nations Conference on the Human Environment(Stockholm)

²⁶Article 8, PTHHA. See also Principle 19 of the Rio Declaration Report of the United Nations Conference on Environment and Development(Rio de Janeiro, June 1992)

²⁷This is said to mean the State from whence the disease(s) began.

²⁸Article 13, PTHHA.

²⁹James Kraska, China is Legally Responsible for Covid-19 Damage and claims Could Be in the Trillions *Texas National Security Review* (Texas, 23 March 2020)

³⁰See 4 above, 28 above

³¹ If a State Party has evidence of an unexpected or unusual public health event within its territory, irrespective of origin or source, which may constitute a public health emergency of international concern, it shall provide to WHO all relevant public health information. In such a case, the provisions of Article 6 shall apply in full.

³²See 30 above

³³Supra

³⁴ <https://foreignpolicy.com/2020/02/15/coronavirus-xi-jinping-chinas-incompetence-endangered-the-world/> accessed on the 10th of October 2020

³⁵ The implementation of these Regulations shall be with full respect for the dignity, human rights and fundamental freedoms of persons. 2. The implementation of these Regulations shall be guided by the Charter of the United Nations and the Constitution of the World Health Organization. 3. The implementation of these Regulations shall be guided by the goal of their universal application for the protection of all people of the world from the international spread of disease. 4. States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to legislate and to implement legislation in pursuance of their health policies. In doing so they should uphold the purpose of these Regulations.

Moving on, one of the basic rules of attribution is that the conduct of any State organ is attributable to the State itself, regardless of the power of such organs.³⁶ The provincial authorities of Wuhan were directly involved in censuring whistle-blowers who claimed that the virus was real.³⁷ On a closer look, it appears that most of the actions and omissions that breached China's international obligations were committed by the local and provincial organs of the country. In this case, the plea of local responsibility cannot hold as this has been nullified by Article 5 of the ARSIWA that considers all actions of the State organ to be the actions of the State regardless of the organ or range of powers.

Notably, latter reports from the WHO show that the rapid and rigorous work of China served as an urgent warning to the world.³⁸ This implies that they fulfilled the obligation to discontinue the actions that led to the international wrong as stipulated in Article 30, ARSIWA. However, China dropped the ball at the early stage of the virus. Studies have shown that if indeed China took the required steps of early reporting and information sharing about the virus; it would have caused a 66% decrease in the number of cases.³⁹

From the aforementioned points, it is clear that China has contravened the IHR, and such contravention is in tandem with the ARSIWA's definition of State Culpability. The Draft Articles of the ARSIWA grants for culpability when *a State breaches any international instrument that it considers binding*- in this case the People Republic of China considers the International Human Regulation as binding.⁴⁰

3.4 Deduction

Drawing credence from above, it is evident that China did breach some binding international instruments in the management of the outbreak of Covid-19. If it is trite that every State must be bound by international obligations, and it is also known that the breach of such obligations will equate to international culpability, then all that needs to be done to prove culpability is to show the specific law that is internationally applicable to the issue in question and show that the alleged State has breached the said laws. An examination of the points above will show that this has been done; therefore it goes to show that the People Republic of China bears a high degree of culpability for the spread of the Coronavirus.⁴¹

4.0. Recommendations

The outbreak of Covid-19 has caused varying degrees of mayhem in States across the globe. However, over-emphasizing that would equate to crying over spilled milk. This is why it is recommended that an equitable and sufficient reparation be made to States that have been injured by the virus. States have tried to do this by instituting an action against China for punitive damages at the International Court of Justice, but this is a folly on its own because not only does China not recognize the jurisdiction of the Court, it is also within its rights as a sovereign nation to disregard the Court summons.⁴² Interestingly, China recognizes the IHR as binding,⁴³ and it also subscribes to the provisions of ARSIWA which provides that reparations can be done in the form of Restitution, Compensation, and Satisfaction.⁴⁴ Hence, it is recommended that a neutral arbitral process should be invoked by the injured States to arrive at a suitable form of reparation.

³⁶Art 4, ARSIWA

³⁷See 5 above

³⁸Kelly Eanna, China was Slammed for Its Initial Covid-19 Secrecy(*Science Business*, 7 April 2020) <<https://sciencebusiness.net/covid-19/international-news/china-was-slammed-initial-covid-19-secrecy-its-scientists-leads-way>>accessed 22 July, 2020.

³⁹Epidemiology Research by the University of South Hampton

⁴⁰Appendix 1, International Health Regulations (3rd ed, 2005)

⁴¹

⁴²

⁴³Appendix 1, International Health Regulations (3rd ed, 2005)

⁴⁴See Chapter II, Article 35, 36, & 37 of the ARSIWA.

It is evident that Restitution is somewhat impossible, seeing as there can be no restitution of the human lives lost. Punitive remedy to all the affected nations of the world may also be impossible as it would require paying all the Countries who were affected by the pandemic. Nevertheless, there can be a combination of Compensatory and Satisfactory measures. In this way, the culpable State can remunerate some form of Compensation, such as the provision of the materials needed to produce and supply the vaccines of Covid-19 (if one is discovered). The State can also pay Satisfaction in the form of acknowledgment of culpability, expression of regret and a formal apology, or any other appropriate modality that is deemed fit by the Arbitrator(s).⁴⁵

5.0. CONCLUSION

Although it is acknowledged that China made several valiant efforts to curb the spread of the virus at the latter stage of its outbreak, there is no doubt that the havoc and loss that has accompanied Covid-19 could have easily been kept at bay if the right steps had been taken at the inception of the outbreak. There is no definite remedy to encompass the damage done, but the acceptance of culpability and reparations by China will be a starting point to set the pace for the post-COVID-19 normal.

REFERENCES

- Sarah Newey and Anne Gullard, What is Coronavirus, How Did It Start, and How Big Could It Get? *The Telegraph*. (United Kingdom, 23 August, 2020)
- David Fidler, Covid-19 and International Law: Must China Compensate Countries for the Damage? (*Just Security*, 27 March, 2020)
- Emily Rauhala, World Health Organization: China Not Sharing Data on Coronavirus Infections among Health Care Workers *the Washington Post* (Washington, February 26, 2020)
- Katja Creutz, China's Responsibility for the Covid-19 Pandemic: An International Law Perspective (*Finnish Institute of International Affairs*, 2020)
- "Culpability," Merriam-Webster.com Dictionary <<https://www.merriam-webster.com/dictionary/culpability>> accessed 1 October, 2020.
- James Kraska, China is Legally Responsible for Covid-19 Damage and claims Could Be in the Trillions *Texas National Security Review* (Texas, 23 March 2020)
- Kelly Eanna, China was slammed for its initial Covid-19 Secrecy (*Science Business*, 7 April 2020) <<https://sciencebusiness.net/covid-19/international-news/china-was-slammed-initial-covid-19-secrecy-its-scientists-leads-way>> accessed 22 July, 2020.
- International Law Commission, *The Draft Articles on the Responsibility of States for Internationally Wrongful Acts* {Supplement No.10 (A/56/10), Chp. IVE.1} (2001)
- The World Health Organization, *the International Health Regulation* (3rd ed, 2005)
- International Law Commission. Draft Articles on Prevention of Transboundary Harm from Hazardous Activities {UN Doc. A/RES/56/82, Supp. (No.10) A/56/10 (V.E.1)} (Geneva, 2001)

⁴⁵See Article 56(3) of the IHR